

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-220588 DATE: January 22, 1986
MATTER OF: TMS Building Maintenance

DIGEST:

1. Protest against agency actions during the protester's contract performance concerns contract administration and is for consideration by the procuring agency, not GAO.
2. Protest that agency improperly awarded a sole-source contract is dismissed as untimely since it was not filed within 10 days after the protester knew the protest basis.
3. Protest against agency's failure to request an offer from the protester, whose contract had just expired, for a 5-month, emergency contract for essentially the same services is denied where the agency reasonably determined that, based on problems the protester had encountered in an aspect of performance that would be critical to the 5-month contract, the firm was not a potential source.
4. Although the Competition in Contracting Act of 1984 authorizes an agency to use noncompetitive procurement procedures in situations of unusual or compelling urgency, the statute also requires the agency to solicit offers from as many potential sources as is practicable, and does not recognize a lack of advance planning as a legitimate justification for using such procedures.

TMS Building Maintenance protests sole-source contract awards by the Department of Energy (DOE) to Taylor Waites Company for janitorial services for DOE's Albuquerque office, to be performed in a number of buildings located in the secured area of a military reservation and in three unsecured buildings. TMS also protests certain actions

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taken by DOE while TMS was performing the janitorial services as the incumbent contractor. In addition, TMS requests reimbursement of the costs it incurred in pursuing this protest.

We dismiss the protest in part and deny it in part. We deny the request for costs.

TMS was the contractor for the janitorial services from October 1, 1982, through September 20, 1985. During TMS's contract performance, its contract was modified because one building was being renovated and did not require janitorial services. Also, according to DOE, TMS was having problems performing the balance of the contract. Specifically, TMS did not have a sufficient number of personnel with security clearances to provide services in the secured area. Consequently, when the renovations were completed, DOE did not permit TMS to resume work in the building; instead, on April 8, 1985, DOE awarded a contract to Waites on a sole-source basis to provide those services. The contract was modified on August 4 and September 4 to encompass additional buildings. Performance under Waites' contract initially ended on September 30 but, due to the present protest, subsequently was extended into October.

TMS first protests that any performance problems it experienced while it was the contractor were caused by DOE's unreasonable interference; that its contract did not require a specific number of personnel with security clearances; and that DOE improperly permitted Waites to perform some duties covered by TMS's contract while TMS still had the contract.

These allegations concern matters of contract administration, which is the responsibility of the contracting agency. See Satellite Services, Inc., B-219679, Aug. 23, 1985, 85-2 C.P.D. ¶ 224. Disputes on such matters are to be reviewed pursuant to the contract's disputes provisions rather than under our Bid Protest Regulations, 4 C.F.R. part 21 (1985), which are reserved for considering whether the award or proposed award of a contract complies with statutory and other legal requirements. Consequently, we will not consider this basis of TMS's protest.

TMS next protests the April 8 award of a sole-source contract (lasting, as modified, into October 1985) to Waites for services in the renovated building in the secured area. We will not consider this issue, however. Under our Bid Protest Regulations, a protest like this one must be filed

within 10 working days after the protester knows or should know the basis of the protest. 4 C.F.R. § 21.2(a)(2). From the comments submitted by TMS, it is apparent that TMS knew Waites was performing under that contract as early as August 1985. Since TMS did not submit its protest until September 26, this issue is untimely.

Finally, TMS protests that in October DOE awarded another sole-source contract to Waites; TMS argues that the agency at least should have solicited an offer from TMS.

DOE responds that as TMS's contract was expiring at the end of September the agency was considering whether to complete preparation of the materials needed for a competitive procurement to secure the services for the following period, or to contract for the services through the Small Business Administration (SBA) under the 8(a) program. The janitorial services, however, were needed immediately to avoid adversely affecting the health and safety of employees, and to avoid the immediate closing of the cafeteria and health unit. DOE therefore decided to award an interim, 5-month contract to cover the period from when TMS's contract expired until a competitive or 8(a) award could be made.

As to DOE's decision not to solicit an offer from TMS for that period, the agency explains that the contractor's employees will be performing services in an area where they inadvertently may view restricted information and, consequently, the contractor has to have a sufficient number of personnel with DOE security clearances, which are obtained only after a full field investigation and take 6 to 8 months to process. The agency asserts that having a sufficient number of personnel with security clearances also was a requirement of TMS's contract and that, as stated above, TMS did not meet its obligations in that regard. Because TMS did not have enough personnel with security clearances, DOE argues that award of the 5-month contract to Waites, the only known source able to begin performance right away, was proper.

Under the Competition in Contracting Act of 1984 (CICA), an agency may use noncompetitive procedures to procure goods or services where the agency's need is of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 41 U.S.C.A. § 253(c)(2) (West Supp. 1985). This

authority, however, is limited by the CICA provisions at 41 U.S.C.A. § 253(e), which requires agencies, nevertheless, to request offers from as many potential sources as practicable, and at 41 U.S.C.A. § 253(f)(5)(A), which states that a lack of advance planning does not justify the use of such procedures. Further, before using noncompetitive procedures, an agency must execute a written justification for doing so, which is to include a description of efforts made to ensure that offers are solicited from as many sources as is practicable, and a description of any market survey conducted or a statement of the reasons why a market survey was not conducted. 41 U.S.C.A. § 253(f)(3).

We see no basis to object to DOE's decision that TMS could not meet the agency's needs when DOE awarded the contract to Waites in October. The record shows that DOE had issued a cure notice to TMS and had contemplated terminating TMS's contract, which already had been modified a number of times to decrease the secured area in which TMS provided service; as stated above, TMS had been unable to provide an adequate number of personnel with the necessary clearances. DOE did not pursue termination, however, only because the contract was to expire in 2 months and because TMS agreed to correct the deficiencies in its performance. The record further shows that during an August 30 meeting, TMS stated that it could provide only two full-time and three part-time employees with security clearances, which DOE found unacceptable for more than limited work. Notably, while TMS disputes the reasons for its performance problems, and whether its contract required the number of cleared employees that DOE was requesting, the firm does not deny that problems existed. Given these factors, we cannot conclude that DOE unreasonably determined that TMS was not an available source to perform the services. We therefore deny TMS's protest against DOE's failure to solicit an offer from the firm for the 5-month contract.

Nevertheless, we point out that the fact that TMS could not perform does not in itself justify DOE's decision to award a sole-source contract to Waites without giving any other possible contractors a chance to compete. Although the janitorial services may have been needed immediately and the successful contractor had to employ a number of cleared personnel, DOE has not explained why it found that Waites was the only available source with a sufficient number of cleared personnel to perform the contract. As stated above, an agency must solicit proposals from as many firms as is practicable even when using CICA's noncompetitive procedures.

Furthermore, and as also stated above, an agency may not use a lack of advance planning to justify the use of noncompetitive procedures. DOE, obviously aware that TMS's contract would expire in September, knew as early as April 1985 that TMS was having performance problems because the company did not have the necessary number of cleared personnel. At that time, DOE also knew that the successor contractor would have to have cleared personnel and that it would take 6 to 8 months to obtain security clearances. Yet it does not appear that DOE took any steps before September to plan for the use of competitive procedures to secure the required services after TMS's contract was completed. There is no evidence in the record that DOE attempted to contact other potential sources, and DOE did not conduct a market survey only because, according to the agency, a 1981 cost comparison showed that it would be cheaper to contract for the services than to have government personnel perform them. The purpose of a market survey, however, is not to determine the cost benefits of contracting for services but, in accordance with the principle that agency's should achieve maximum competition, to determine if there are other qualified sources capable of meeting the government's needs.

Accordingly, although we have denied this protest, by separate letter we are bringing the matter of the sole-source award's propriety to the attention of the Secretary of DOE. In this respect, this procurement deficiency does not warrant terminating Waites' contract at this time, since the services must be provided continuously; the contract was awarded to Waites for only 5 months; and when the contract expires DOE plans to procure the services competitively or to contract with the SBA under the 8(a) program.

Finally, TMS requests that it be paid the costs of pursuing its protest. A protester is entitled to such costs only where the contracting agency has unreasonably excluded the protester from the procurement. 4 C.F.R. § 21.6(e). Since we have concluded that TMS was not unreasonably excluded here, the firm is not entitled to the claimed reimbursement.

The protest is dismissed in part and denied in part.

Harry R. Van Cleve

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General Counsel